

**U.S. Department of Labor**

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**Issue Date: 24 January 2007**

Case Nos.: 2006-AIR-00003  
2006-AIR-00024

In the Matter of

**DANNY LE ROY**  
Complainant

v.

**KEYSTONE HELICOPTER, INC.**  
Respondent

Appearances:

Scott M. Pollins, Esquire  
For Complainant

John A. Adams, Esquire  
For Respondent

Before: **RALPH A. ROMANO**  
Administrative Law Judge

**RECOMMENDED**  
**DECISION AND ORDER**

This matter arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (“the Act”), 49 U.S.C. §42121 *et seq.* and the regulations promulgated thereunder, which can be found at 29 C.F.R. 1979 (2006). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (“FAA”) or any other provision of federal law related to air carrier safety. 49 U.S.C. §42121(a).

On July 25, 2005, Danny LeRoy (“Complainant”) filed a complaint with the United States Department of Labor’s Occupational Safety and Health Administration (“OSHA”) against his former employer, Keystone Helicopter, Inc. (“Respondent”).<sup>1</sup> The formal hearing in this matter was held in Philadelphia, Pennsylvania on July 19 and 21, 2006. Following the formal hearing, I issued an order on September 7, 2006 closing the record and directing submission of

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<sup>1</sup> The case number for the first claim is 2006-AIR-00003

briefs on or before September 25, 2006. Briefs for both parties were received on September 25, 2006.<sup>2</sup>

On May 11, 2006, Complainant filed an additional complaint against Respondent with OSHA.<sup>3</sup> I issued an order on September 25, 2006 consolidating the two complaints. A formal hearing on that claim was held on October 11, 2006 in Philadelphia, Pennsylvania. Following that hearing, I granted Respondent thirty days after receipt of the transcript and the Complainant thirty days thereafter, to file their briefs.

Respondent's counsel first addressed the issue of coverage in his brief dated September 25, 2006, and therein asserts that Complainant has failed to establish an essential element of his claim. As I had not been favored with a response from Complainant's counsel regarding that matter, I granted Complainant's counsel fifteen days to submit a response and Respondent's counsel ten days thereafter to submit a rebuttal. Complainant's responsive brief was filed on December 19, 2006.<sup>4</sup> Respondent's rebuttal brief was filed on December 28, 2006.<sup>5</sup>

An employee seeking relief under the Act must show that his employer is an "air carrier" under the Act. The regulations implementing the Act state that the definition of "air carrier" under the Federal Aviation Act, 49 U.S.C. § 40101, *et. seq.* ("FAA"), is applicable to the Act.<sup>6</sup> The FAA defines "air carrier" as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C. § 40102(a)(2). "Air transportation" is further defined as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C. § 40102(a)(5).

That Respondent is an air carrier and thus covered under the Act is an essential element of Complainant's *prima facie* case, therefore where Complainant has failed to establish that Respondent is an air carrier is fatal to the complaint on the merits. *See Fullington v. AVSEC, et al., ARB Case No. 04-019, Oct. 26, 2005.* Respondent argues that it is not covered by the Act because Complainant presented no evidence at either trial on either complaint that Respondent uses its helicopters and services in foreign air transportation, transportation of mail by aircraft, or interstate air transportation. (R. Supp. B. at 2). Complainant argues that Respondent waived this argument by not presenting this issue at trial. (C. Supp. B. at 2-3). Complainant relies on the Supreme Court's holding in *Arbaugh v. Y&H Corp.*, 126 S.Ct. 1235 (U.S. 2006), that a failure to establish a substantive element to a claim, as opposed to an assertion that subject matter jurisdiction is lacking, must be raised prior to the close of trial on the merits and before a judgment is entered.

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<sup>2</sup> Complainant's brief will be cited as "CB at --." Respondent's brief will be cited as "RB at --."

<sup>3</sup> The case number for the second claim is 2006-AIR-00024.

<sup>4</sup> Complainant's supplemental brief will be cited as "C. Supp. B. at --."

<sup>5</sup> Respondent's supplemental brief will be cited as "R. Supp. B. at --."

<sup>6</sup> Procedures for Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, 68 Fed. Reg. 55, 14101 (March 21, 2003).

Alternatively, Complainant argues that documents annexed to his responsive brief establish that it is an “air carrier” covered under the Act, which I accept as a motion, under 29 C.F.R. 18.54 (c), to re-open the record to present evidence on this issue.

## I

In Arbaugh, the Supreme Court held that the employee-numerosity requirement for establishing “employer” status in an action brought under Title VII, is an element of plaintiff’s claim for relief, and not jurisdictional.<sup>7</sup> Thus, the failure to raise this issue prior to the conclusion of trial and judgment constituted a waiver thereof. The court noted that had this issue been jurisdictional in nature, such issue may have been raised at any time, and could never have been waived. Notably, at the District Court level in that matter, the defendant would-be employer had, prior to trial, admitted the jurisdictional allegations and contested only the merits of the claim. Only after the jury verdict in favor of the plaintiff and entry of judgment thereon did it raise this coverage issue. At that point, the District Court apparently re-opened the record for evidence on this issue, and thereafter ruled in favor of the defendant, vacating its prior judgment and dismissing the complaint. Reversing, the Supreme Court created a “- - bright line- - ” governing the issue of coverage as an element of a claim rather than a jurisdictional matter.

Here, Respondent did not admit jurisdiction and concede the coverage issue, nor has this matter gone to judgment, i.e., decision and order. Accordingly, Complainant’s reliance on Arbaugh is misplaced, as no waiver of this issue has occurred, and the raising thereof timely.

I find that Complainant presented no evidence prior to the close of the record to establish that Respondent is an air carrier under the Act. Complainant first argues that the record does contain evidence that Respondent is covered by the Act. (C. Supp. B. at 3). Complainant asserts that the secretary’s findings that Respondent is covered under the Act should be considered as evidence to establish this element. (C. Supp. B. at 3). However, the secretary’s legal conclusions regarding coverage are not binding upon me. Complainant then argues that the record establishes that Respondent is covered under the Act because there is evidence that Respondent follows the Federal Aviation Administration’s (“FAA”) safety guidelines.<sup>8</sup> (C. Supp. B. at 3-4). However, I am compelled to find that this merely establishes that Respondent falls under the jurisdiction of the FAA. I fail to see how this evidence establishes that Respondent is an “air carrier,” which engages in foreign air transportation, interstate air transportation, or the transportation of mail by aircraft, as defined for purposes of the Act.

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<sup>7</sup> No decisional law is referenced by the parties on the question whether the air carrier coverage issue in the within type of proceeding is jurisdictional or not.

<sup>8</sup> Keystone’s Vice President of Human Resources, Joseph Tauber, wrote in a letter to David Hill, OSHA’s investigator, that Keystone maintains the highest standards of safety and Federal Aviation Regulations compliance. (RX7). In addition, Respondent’s log sheets signify that they follow the FAA safety regulations. (CX13). Furthermore, Angel Estrada, Complainant’s supervisor testified that he had full knowledge of the FAA guidelines. (CX4).

## II

Complainant attempts to provide additional evidence after the record was closed to establish that Respondent is covered under the Act. (C. Supp. B. Ex. 1-4). Complainant argues that these materials should be entered into the record in the interest of fairness. (C. Supp. B. at 7). Complainant further asserts that he should be allowed to amend his pleadings to cure defective allegations regarding jurisdictional defects. (C. Supp. B. at 8). Complainant relies on *Eklund v. Mora*, 410 F.2d 731 (5<sup>th</sup> Cir. 1969), which held that the court has the discretion to allow a party to amend the pleadings to correct defective allegations of jurisdiction. However, I find the Complainant's argument flawed since Complainant inconsistently claims that the question whether Respondent is covered under the Act as an air carrier is not a jurisdictional question. (C. Supp. B. at 2-3). Therefore, assuming that Complainant's failure to establish that Respondent is covered under the Act as an air carrier is not jurisdictional in nature, there exists no basis to amend a jurisdictional pleading! And, in any event, even if I were to permit a pleading amendment, the absence of evidence supporting jurisdiction would still exist.

Furthermore, a motion to amend is within the discretion of the court and should only be denied for a substantial reason, including prejudice to the opposing party. *See Moll v. Southern Charters*, 81 F.R.D. 77 (E.D.N.Y. 1979); *Kerrigan's Estate v. Joseph E. Seagram & Sons*, 199 F.2d 694 (3<sup>rd</sup> Cir. 1952). I find that to allow Complainant to present new evidence after the record is closed would unduly prejudice the Respondent. Had the Complainant properly presented this evidence before the close of the record, Respondent would have had the opportunity to respond and present evidence to counter Complainant's assertions. However, since Complainant did not present this evidence until several months after the close of the record, Respondent did not have the opportunity to respond in a fair manner. Therefore, I am compelled to not allow this additional evidence to be admitted into the record.

Also, in order to reopen the record, Complainant must show that the evidence to be submitted was "new and material...available [evidence], which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c). This has not been shown. I note that, Complainant stated in a brief filed on October 5, 2006, in opposition of Respondent's supplement to its post-hearing brief, that "Respondent's attempt to supplement its post-hearing brief is akin to offering evidence after the record is closed, which is forbidden by 29 C.F.R. § 18.54." (Complainant's Post-Hearing Supp. Brief at 2). Complainant is now attempting to do exactly what he claimed to be "forbidden" to Respondent under the regulations.

## III

Assuming, *arguendo*, that I admit the proposed evidence into the record, I am still compelled to find that Complainant has not established that Respondent is an air carrier pursuant to the Act. The evidence presented consists of various brochures, which I find, at best, ambiguous as to whether Respondent engages in foreign air transportation, interstate air transportation, or the transportation of mail by aircraft. The aforementioned brochures establish

that Respondent has operations located throughout the Eastern United States<sup>9</sup> and Worldwide. (C. Supp. B. Ex. 1-4). Respondent argues that while these brochures establish that Respondent operates in several states, the brochures are silent as to whether Respondent's services transcend state or international lines or whether those services include mail transportation. (R. Supp. B. at 6). I am compelled to agree with this assertion.

In addition, I note that the brochures are merely advertisements which reflect the services offered by Respondent. Complainant did not provide any testimony or additional evidence to establish that in addition to merely offering and advertising their services, it actually does carry out services which require interstate air transportation, foreign air transportation, or transportation of mail by aircraft. Without more, I do not find this evidence establishes that Respondent actually engages in interstate air transportation, foreign air transportation, or transportation of mail by aircraft.

Therefore, I find that the evidence does not establish that Respondent is an air carrier and therefore Respondent has not been proven to be covered under the Act.

### **RECOMMENDED ORDER**

As Complainant has failed to establish the essential element of coverage, I recommend this matter be DISMISSED.

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RALPH A. ROMANO  
Administrative Law Judge

Cherry Hill, New Jersey

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

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<sup>9</sup> Respondent's operations are located throughout New England, New York, New Jersey, Eastern Pennsylvania, the Mid-Atlantic States, North and South Carolina, Georgia, Tennessee, Texas, Oklahoma, Louisiana, Arkansas, and Florida. (C. Supp. B. Ex 2-3).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).